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No. 706

In the Supreme Court of the United States

OCTOBER TERM, 1954

THE UNITED STATES, PETITIONER

v.

RUSSELL H. WILLIAMS, D/B/A WILLIAMS EQUIPMENT CO., and REED & MARTIN, a Corporation

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THE UNITED STATES, PETITIONER

v.

GENERAL CASUALTY COMPANY OF AMERICA, CENTRAL SURETY AND INSURANCE CORPORATION, WACKER CORPORATION, and N. E. DAUGHERTY, D/B/A N. E. DAUGHERTY CONSTRUCTION COMPANY

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS ON BEHALF OF RUSSELL H. WILLIAMS, ET AL

TRACY E. GRIFFIN
1107 American Bldg.
Seattle, Wash.

W. H. FERGUSON and
DONALD MCL. DAVIDSON
of Counsel
1012 Northern Life Tower
Seattle, Wash.

FRAYN LETTERPRESS

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Russell H. Williams d/b/a Williams Equipment Co. and Reed & Martin, a corporation, oppose the petition for certiorari.

QUESTIONS PRESENTED

Was the decision of the designated head of the department under a government construction contract supported by substantial evidence?

STATEMENT

Respondents entered into a contract to construct a road at Fairbanks, Alaska. One of the pay items of the contract was borrow material used for subsurfacing. Another item was "overhaul", the distance from the Birch Hill Quarry, where the borrow was obtained, to the point on the road where it was placed, less a designated distance (Finding 4). The contract provided that the borrow should be paid for by surveying the borrow pit before and after the material had been removed (Finding 7). Prior to commencing the work, the government established a base line 1,000 feet long parallel to the face of the Birch Hill Quarry. Profiles were made at 25 foot intervals of the face of the quarry (actually a hill rather than a hole as the name connotes) (Findings 13 and 14). Before commencing work, respondents and Mr. Foster, the government's resident engineer, adopted a method of measurement based upon truck loads of material used so that progress payments could be made to respondents and respondents could pay their hauling sub-contractors. Each truck was measured, its volume calculated and the calculated volume reduced between 25% and 30% to give effect to the increase in volume due to swell.[1] Thereafter each

[1] The court below did not find that the reduction was 25%. There was, however, no dispute in the evidence, all witnesses agreeing that 25% was used except for a few trucks briefly on the job where 30% was used (Tr. 24, 33, 105, 149.)

truck was numbered and each load checked by two government inspectors and one representative of respondents. These three load counts were reconciled daily and tabulated (Finding 15).

Since respondents and Mr. Foster both anticipated that final payment would be based upon surveys of the borrow pit, they were conservative and attempted to establish a method that would show about 5% less than the contract method of measurement (Tr. 37, l. 8-10; 117, l. 21).

After respondents had removed 34,596 cubic yards of material, according to the daily truck count, a slide occurred at the borrow pit. As a result of the slide, a large amount of material moved downward and outward toward the base line where respondents were operating and fissures or cracks appeared behind the face of the slope and outside of the area originally cross-sectioned. One of these was 50 feet long, 10 feet wide and at least 20 feet deep (Finding 17).

The afternoon of the slide a representative of respondents discussed with Mr. Foster the effect of the slide on the possibility of using surveys of the borrow pit to determine quantities. The latter indicated that the truck load measurement would be accurate within 5% and that such method would be adopted unless respondents were notified to the contrary (Finding 18). The Court below found that

Mr. Foster, the resident engineer, did not discuss the matter with his superiors. Colonel Noyes, the head of the Alaska Road Commission, however, testified:

> "Well, prior to his leaving we did discuss the matter [of the slide], I think. I don't remember exactly whether Mr. Foster brought the matter up with me or didn't. I think he did, but I don't recall the details." (Tr. 855-856, 864).

After the slide, respondents continued performance of the contract and continued to be paid on the truck load count. At the conclusion of the job respondents had been paid for 99,592 cubic yards (Finding 19).

While the work was in progress, a representative of the contracting officer was sent specifically to investigate why borrow quantities were being used in excess of the 57,000 cubic yards estimated. This representative reported that about 43,000 extra cubic yards would be required because of a change in the road and because of extensive mud boils, i. e. subsidence through poor subsoil. The government continued to make payments on the truck count after receipt of this report (Finding 20).

Thereafter the government caused a survey of the borrow pit to be made. This showed a net yardage removed of 69,349.7, of which 4,152.42 cubic yards was rejected and 461.38 cubic yards was

overburden, leaving 64,735.90 cubic yards as the amount incorporated in the road. The two former items were measured exactly and there is no dispute as to their accuracy. In the final survey, four of the 27 profiles were wholly negative and six others partially negative, i. e. there was more material in these sections after the excavation than there was before the work started (Finding 23).

The wholly negative sections confirmed the testimony of Mr. Williams, respondents' representative on the job, that the hill "slid outward, enough to extend the toe of the slope beyond where we had originally started in some places" (Tr. 153).[2]

Respondents protested the reduction in pay quantities. Thereafter the government measured the material actually in place in the road embankment and found there were 66,566.5 cubic yards actually in the road embankment (Finding 25). This measurement was 1830.6 cubic yards more than had been found as a result of the survey. Mr. Ghiglione ordered this measurement to be made, anticipating it "to be almost a certainty that this dispute will wind up in court" (Pl. Ex. 35, par. (c)). This measurement of the road was inaccurate and unfavorable to respondents in that it failed to include very substantial amounts of material: Material that sank into the road (a government responsibility)

[2] Petitioner cites this and similar testimony negatively (Pet. B. p. 18) with the inference that the slide did not carry out to the original point of beginning.

for maintenance during the course of construction in so-called mud boils (estimated by Mr. Foster at 5,000 yards (Tr. 68-69); material used in excavated mud boils (estimated by Mr. Foster at 7,000 yards (Tr. 68), and by Mr. Ghiglione at 6,000 yards (Tr. 400)); additional material used in constructing driveways for new homes built on the highway, and intersections (estimated by Mr. Foster at 5,000 cubic yards, Tr. 68); material required as a result of changes in the location of the road and an error in measurement on the original plans (estimated by Mr. Foster as 4,000 cubic yards, Tr. 69), and additional fill placed at a point where there were insufficient original measurements (estimated by Mr. Foster at a minimum of 8,000 cubic yards, Tr. 68). Finding 25 established the fact of these omissions and errors, but did not make findings as to all the specific amounts of the errors and omissions shown by the evidence.[3]

Mr. Ghiglione and Mr. Noyes knew and any competent engineer would know that measurement of the road embankment in place without allowance for extra material used for mud boils, driveways, intersections and changes in alignment would be less than the true amount of material used and be

[3] In the absence of the slide, such loss of material and errors and omissions would have been immaterial to respondents, since the survey would have automatically included the extra material required.

unfavorable to respondents (Tr. 54, 295, 614-615, 686-687, 771-772, 885).

Thereafter there was an appeal from the contracting officer's decision. Government representatives made a so-called "specific gravity test." This test, and calculations made in connection with it, resulted in a figure of borrow used on the road of 76,000 cubic yards, 11,264.1 yards more than the amount allowed. This test was, however, also inaccurate and unfavorable to respondents in several respects. A three-yard truck was used in the determination of the voids existing in a load, whereas respondents had used nothing but six-yard trucks and larger (Finding 27). A smaller truck will result in showing a higher percentage of voids. In the truck load count relied upon by respondents, a larger swell factor was used for seven-yard and under trucks than for larger sizes (Finding 15). In the specific gravity test, the government assumed that respondents had used a swell factor of 15%, whereas in fact they had used a swell factor of 25% to 30% (Tr. 105). The government had been advised that the larger swell factor had been used (Def. Ex. 12, p. 3). The Court below pointed out that use of the 25% swell factor in the government's test would have resulted in a figure of 88,946 cubic yards (App. 6A, footnote 3). Finally, the specific gravity test took no account whatso-

ever as to voids actually occurring in the material in the virgin state (ibid).

All parties knew the material in the virgin state was not solid rock (Tr. 16, 289, 440, 467-469, 684-685, 735, 758), and that respondents were not to be paid on that basis (Tr. 440-441). Estimates as to the voids actually existing in the virgin material were up to 16% or 17% (Tr. 5, 736, 758, 774). Representatives of the government who made the test knew it was the type of test that would be used if the government had deliberately wanted to cheat respondents (Tr. 439-440, 558). Any competent engineer would know these tests were inaccurate, unfavorable to and tending to cheat respondents (Tr. 296, 439-441, 558, 701-702, 772-775, 777, 876-877).

The Court below made no finding of fact whatsoever that the truck load count was inaccurate, although stating in its opinion that "more allowance should be made for voids than was made in that computation" (App. 7A).

Finding 15 establishes the care with which the truck measurement was made at the time the work started and prior to the time of the slide or the possibility of dispute. It also established the meticulous care in checking the accuracy of that method of measurement. Similarly, Finding 15 shows that respondents paid sub-contractors on

that method of measurement so that it was to respondents' interest to have that method err, if at all, on the side of being too small. In addition, the uncontradicted evidence was that the trucks were fully loaded (Tr. 331), that there were complaints about spillage on the highway from the trucks and complaints by the truck drivers that the trucks were overloaded (Tr. 35, l. 7-12), that in making the truck measurement, the government's resident engineer was "being conservative" (Tr. 117, l. 21), intending to show about 5% less than the contract method of measurement would have shown in the absence of the slide (Tr. 37, l. 8-10).

Finding 8 also establishes that the contract itself provided for the same "truck measurement at point of delivery" for borrow from other sources. Truck measurement was the contract method of measurement for other bid items as well. It is a standard and well recognized method used in the contracting industry generally (Tr. 120, 867).

Colonel Noyes, head of the Alaska Road Commission, relying upon the embankment measurement of 66,567 cubic yards and specific gravity measure of 76,000 cubic yards as compared to the 64,736 cubic yards computed by survey, adopted the latter figure and also allowed 4,152.4 cubic yards as rejected material and 436.1 cubic yards as overburden (Finding 27).

ARGUMENT

I. The Court below held that the evidence advanced in support of the decision actually contradicted it.

The decision was based entirely upon the contract method of measurement "which had been made impossible of accurate application because of the slide which had occurred." (Opinion 4A)

Neither the contracting officer nor the head of the department made any finding whatsoever as to the effect of the slide or that the truck load measurement used by respondents was inaccurate. The slide was completely ignored and respondents paid as though it had not occurred, notwithstanding the fact that there were ten wholly or partially negative profiles out of the 27 used.

The survey calculation disclosed that 64,735.9 cubic yards of material has been used on the roadway. Three other methods of measurement were available to check these results. The first calculation, of the roadway embankment, showed that 66,566.5 cubic yards had been used and were actually measured in place; the second, a calculation based upon the specific gravity of the material, disclosed that 76,000 cubic yards had been used; the third, actual measurement of each truck load during the course of the work pursuant to calculation made by the government's own resident en-

gineer, determined that 99,592 cubic yards had been placed on the road.

On its face, the decision of the contracting officer as affirmed by the head of the department, claims that 66,566.5 cubic yards of material actually measured in the road and 76,000 cubic yards calculated by test proves the accuracy of 64,735.9 yards.

The Court below actually determined that these tests were no evidence in support of the decision. It found that the surveys made by the government did not satisfactorily account for the effect of the slide, as

> "* * * is plainly evident from the *opposing evidence* which was before the administrative officials when the final decision was made and *which they contend confirmed the original de-decision.*" (Opinion 5A, emphasis supplied.)

And again:

> "When we consider the inaccuracies which would certainly result from an attempted use of the average end area method under the changed conditions resulting from the slide, it is difficult to see how three other computations, all of which resulted in substantially greater amounts, could be said to give anything approaching a confirmation of the amount determined by the head of the department." (Opinion 7A)

Assuming that the measurement of the roadway in place and the specific gravity tests were ac-

curate, that very accuracy would prove that a smaller figure was inaccurate. If, on the other hand, the measurement and test were inaccurate, they could not by their mutual weakness sustain a third and greater error.

Even if the scope of judicial review were limited to setting aside those decisions which show on their face that they are erroneous, the decision of the Court of Claims was correct.

II. If the evidence relied upon in support of the decision by the head of the department could be said to support that decision, the facts show that such evidence was without foundation.

The court below found that the measurement of the embankment in place "failed to take into consideration indeterminate amounts of material" (Finding 25) and lists some seven separate items which that measurement failed to take into account (Finding 25(a) — mud or frost boils and places where the road sank; (b)—driveways and intersecting roadways; (c)—change in location and error in chaining; (d) fill at Noyes Slough). The Court said:

> "With these omitted amounts added to the 66,566.5 cubic yards which were computed, the amount becomes substantially greater than that allowed in the final determination." (Opinion 5A).

The specific gravity test was made with a three yard truck whereas "a more accurate determination and tending to be more favorable to the plaintiffs would have resulted by the use of trucks of the sizes which were used in performing the work" (Finding 27). In addition, "no account was taken of voids that might occur in the material in the virgin state" (Opinion 6A, footnote 3) and "the allowance for the swell factor was unfavorable to the plaintiffs" (Opinion 6A). The Court of Claims said:

> "We are convinced that with the use of a truck of the proper size and with the swell factor appropriately resolved an even greater disparity would have been shown." (App. 6A)

Upon the assumption that the greater figures resulting from the measurement of the embankment and the specific gravity tests confirmed the lesser amount, respondents were entitled to show facts fairly detracting from their weight.

House Report No. 1380, 83rd Congress, Second Session, of the Committee on the Judiciary (2 U. S. Code, Cong. and Admin. News, 2191) recommending passage of Public Law 356, says in part:

> "The proposed amendment also adopts the additional standard that the administrative decision must be supported by substantial evidence. The requirement that administrative action be supported by substantial evidence is found in the Administrative Procedures Act. *supra.*

In *Consolidated Edison Company of New York v. Labor Board,* 305 U. S. 197, at page 230, decided in 1938, long before passage of the Administrative Procedures Act, this court said:

> "* * * assurance of a desirable flexibility in administrative procedure does not go so far as to justify orders without a basis in evidence having rational probative force. Mere uncorroborated hearsay or rumor does not constitute substantial evidence."

A fortiorari a party seeking review of an administrative decision may show—as in this case—that the evidence purporting to sustain the decision had no "rational probative force."

In *Universal Camera Corp. v. Labor Board,* 340 U. S. 474, at pages 487-488, decided in 1951, after passage of the Administrative Procedures Act and the companion review provisions of the Taft-Hartley Act, but prior to adoption of Public Law 356 this Court finally laid to rest any confusion surrounding the test of "substantial evidence."

> "Whether or not it was ever permissible for courts to determine the substantiality of evidence supporting a Labor Board decision merely on the basis of evidence which in and of itself justified it, without taking into account contradictory evidence or evidence from which conflicting inferences could be drawn, the new legislation definitely precludes such a theory of review and bars its practice. The substantiality of evidence must take into account whatever in the record fairly detracts from its weight."

The Court of Claims cited the *Universal Camera Corp.* case, and properly relied upon it in considering the evidence in the record and before the contracting officer showing the inaccuracies in the embankment measurement and the specific gravity test and the prejudicial effect of such inaccuracies. That evidence and evidence showing the accuracy of the truck load measurement were properly considered by the Court below to show that there was no "rational probative force" in the evidence relied upon by the administrative officers and as evidence that "fairly detracts from its weight."

Labor Board v. Columbian Enameling & Stamping Co., 306 U. S. 292, relied upon by petitioners herein, also decided in 1939, prior to passage of the Administrative Procedures Act, held that there was no substantial evidence in support of a decision of the National Labor Relations Board.

In *O'Leary v. Brown-Pacific-Maxon,* 340 U. S. 504 (1951), this Court "examined the record to assess the sufficiency of the evidence" to sustain a finding of a Deputy Commissioner that an employee lost his life as an incident of his employment. In so doing, the Court gave effect to the purpose of the Longshoremen's and Harbor Workers' Act and the well-recognized rule of law that:

> "Workmen's compensation is not confined by common-law conceptions of scope of employment."

In none of these cases is there the slightest indication that a reviewing court must cast its rejection of an administrative finding in some smooth judicial phrasing expressive of the distinction between the functions of Judge and jury. *Universal Camera Corp., supra,* bars such a mechanistic theory of review.

III. The evidence amply sustains the allowance made by the Court below.

It should be pointed out that review of a contracting officer's decision under Public Law 356 necessarily differs in some respects from review of other administrative decisions. In reviewing orders of the N.L.R.B. and many other bodies, the decision of the court is customarily one of enforcement of an order. In the event the order is based upon substantial evidence, the order is sustained. If there is no such evidence

> "* * * wise judicial administration normally counsels remand of the cause * * * with instructions to reconsider the record."[4]

In a case before the Court of Claims, there can be no remand of the cause to the contracting officer for reconsideration. So here, where the court below "found as a fact that the decision of the

[4] *O'Leary v. Brown-Pacific-Maxon*, 340 U. S. 504, at p. 508.
United States v. Great Northern Ry. Co., 343 U. S. 562, at p. 578.

head of the department was not supported by substantial evidence" (Opinion 3A), it was required to proceed to make a decision itself. That decision is arrived at by the same process that any court or jury adopts in deciding any question of fact. Of course, evidence which detracts from the weight of evidence supporting the administration decision, or showing that there is no rational probative force to such evidence, is admissible and should be considered on the second issue. The court below said that "the substantial weight of the evidence supports an amount in excess of that allowed by the head of the department."[5]

The truck load count established that actual quantities were 99,592 cubic yards. There was not an iota of evidence indicating any inaccuracy in that figure. Indeed, the circumstances surrounding it all establish that it was accurate and erred, if at all, on the side of being too low.

The specific gravity test, corrected to apply the actual swell factor of 25% used in the truck load test results in a calculated quantity of 88,946 cubic yards, and still is unfavorable to respondents in

[5] Petitioners appear to argue that "the court found only" that fact (Pet. Br. 16), whereas this finding was clearly applicable to the second branch of the case. The court had already found (a) that the evidence advanced in support of the administrative decision was actually contrary to it and (b) that the evidence contradicting and conflicting with evidence claimed to support the decision "so detracts from the weight of the evidence in support of the decision as to leave it without substantial support", and hence the decision itself could not be accorded finality.

the case. If there should be any new or novel problems arising out of the administration of Public Law 356, they are not here apparent.

The actual factual issue that brought about the case is a natural catastrophe unlikely to recur. The juxtaposition of a quarry in a hill, a contract providing for quarry measurement, and a major slide at mid-point in the work is unlikely to produce further litigation.

> "Whether on the record as a whole there is substantial evidence to support agency findings is a question which Congress has placed in the keeping of the Courts of Appeals. This court will intervene only in what ought to be the rare instance when the standard appears to have been misapprehended or grossly misapplied." *Universal Camera Corp. v. Labor Board* 340 U. S. 474, 491.

CONCLUSION

The Court below adopted the correct standard of review under P. L. 356. There was no substantial evidence supporting the administrative decision. The evidence amply sustains the findings made by the Court of Claims. The petition for a writ of certiorari should be denied.

Respectfully submitted,

TRACY E. GRIFFIN
1107 American Bldg.
Seattle, Wash.

W. H. FERGUSON and
DONALD McL. DAVIDSON
of Counsel
1012 Northern Life Tower
Seattle, Wash.